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IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-1160

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME and ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,
*Petitioner,*

*v.*

THE LONG ISLAND COLLEGE HOSPITAL,

and

NATIONAL LABOR RELATIONS BOARD,
*Respondents.*

## BRIEF OF RESPONDENT THE LONG ISLAND COLLEGE HOSPITAL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### ARGUMENT

**The petition should be denied.**

Petitioner, Local 144, seeks to impose on this Court's time by asking it to review and reverse the judgment of the Court of Appeals for the Second Circuit that Judge

Friendly's scholarly opinion for the court shows beyond doubt is correct.* The Court of Appeals held that respondent, National Labor Relations Board ("NLRB"), did not comply with the National Labor Relations Act, as amended, 29 U.S.C. §§141 *et seq.* ("Act") when, under the guise of comity, it deliberately failed to consider the facts in the record and blindly rubber stamped the New York State Labor Relations Board's thirteen year old determination under the New York State Labor Relations Act, *New York Labor Law* §§700, *et seq.*, that respondent, The Long Island College Hospital's ("LICH") maintenance employees were an appropriate collective bargaining unit.

Local 144 argues that the Court of Appeals' decision in this case conflicts with decisions of the Courts of Appeals for the Third and Eighth Circuits, fosters a lack of uniformity in the administration of the Act and is of recurring importance regarding the application of the nonprofit hospital amendments to the Act, P.L. 93-360, 88 Stat. 395. Apparently the NLRB disagrees. It too lost before the Court of Appeals, but it is not asking this Court to grant a writ of certiorari and is now considering this case on remand.** LICH submits that the Court should deny Local 144's petition forthwith because (A) there is no conflict among the circuits, (B) the Court of Appeals' decision promotes uniformity in the administration of the Act, (C) the question with respect to "comity" the Court of Appeals decided was almost unique and certainly will not reoccur frequently, and (D) the Court of Appeals was right.

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* Judge Friendly's opinion is reported at 566 F.2d 833 (2d Cir. 1977).

** See letter dated January 17, 1978 from George A. Leet, NLRB Associate Executive Secretary, to counsel for the parties before the NLRB, which is reproduced in the appendix to this brief.



**A. There is no conflict among the circuits.** In both this case below and *Memorial Hospital of Roxborough* v. *NLRB*, 545 F.2d 351 (3rd Cir. 1976), the NLRB refused to consider the facts, granted comity to a state labor relations agency's determination that hospital maintenance employees constituted appropriate units for purposes of collective bargaining, and directed the hospitals involved to bargain.

In both cases the Courts of Appeals refused to enforce the NLRB's bargaining orders relying on the text of the Act (R356-57, 360, A13-14),* the courts' analysis of the legislative history of the nonprofit hospital amendments, which the NLRB acknowledged specifically cautioned against proliferating bargaining units at hospitals (R360-61, A9-12 and 23), the need for a uniform national policy for bargaining units at hospitals (R360, A15, 25), and the courts' analysis of the NLRB's prior comity cases, none of which are inconsistent with this case or *Roxborough* because each involved a bargaining unit over which there was no dispute between the employer and the union (R358-59, A14-15 and n.3).**

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* Numbers in parentheses prefixed "R" refer to pages of the *Roxborough* decision starting at 545 F.2d 351 and numbers prefixed "A" refer to pages of the Second Circuit's decision below contained in the Appendix to the Petition herein.

** *St. Joseph's Hospital* v. *NLRB*, 542 F.2d 495 (8th Cir. 1976), *enforcing*, 221 NLRB 1253 (1975) does not express a conflicting view of comity as Local 144 contends. Rather it approved comity where the appropriateness of the unit the state agency certified was not contested before the state agency or the NLRB. In *St. Joseph's* the employer contended merely that the state had denied it due process and that the state's "accretion" procedure was inconsistent with the NLRB's "accretion" procedure. 221 NLRB at 1257-58. The parties did not raise the questions of what employees constitute an appropriate bargaining unit under the Act, or whether the state agency's bargaining unit determination passed muster under the Act, and the court did not consider or decide those questions.

In both cases the Courts of Appeals granted the hospitals' petitions for review, and remanded to the NLRB with instructions to determine from an analysis of the facts whether the units the state agency found appropriate were appropriate under the Act (R362, A26-28).*

These overwhelming similarities show there is no conflict between the two Courts of Appeals. The court below concluded that the *Roxborough* majority, contrary to the dissenting judge, had held that the NLRB may never apply comity to contested state agency bargaining unit determinations. The court below did not disagree. It simply said:

> "We are not here required to choose between these two able opinions. *Even if it were to be assumed, for purposes of argument only, that we might take the dissent's view* that the NLRB may sometimes apply 'comity' to state unit determinations, great care must be exercised to make sure that the state decision at issue was precisely 'congruent with federal policy' " (A16) (emphasis added).

Having announced that it would reason *arguendo,* the Second Circuit considered the same factors that had led the

* Petitioner's attempt to suggest that a conflict exists between the "instructions" to the NLRB on the remands of the two cases is answered in the opinion below. Noting that the *Roxborough* court permitted the NLRB to reissue a bargaining order without a new election in that case if, after a proper analysis of the facts, the NLRB determines that the unit the state agency found was appropriate is appropriate under the Act, the court below said "If the facts here were similar to those in *Roxborough,* we might well follow the course taken in that case" (A26). However, the Second Circuit noted that in *Roxborough* the election had been held "only some three years" earlier (A26) and concluded that the presumption of continued majority status prevailed. In this case, however, the court noted that the presumption could not prevail and Local 144 lawfully could not be certified without a new election because "the interval is 13 years and only 8 of the 55 employees who were in the unit in 1963 are still members of the present unit of 69" (A27).



Third Circuit to conclude that comity in contested bargaining unit cases is improper *per se,* and concluded from these factors that comity certainly would be improper in this case since the NLRB itself had issued a number of apparently conflicting decisions concerning bargaining units at hospitals (A21-25).

Thus, if this Court were to resolve what Local 144 calls the "conflict" between the Third Circuit in *Roxborough* and the Second Circuit in this case by adopting the position of the *Roxborough* court, that resolution would not change the result below and accordingly the "conflict" is not a real one. R. Stern and E. Gressman, *Supreme Court Practice* 158 para. (6) (4th Ed. 1969). In short, there is no conflict among the circuits.

**B. The decision of the court below promotes uniformity in the NLRB's bargaining unit determinations at hospitals.**

In this case, the Court of Appeals correctly recognized that the NLRB's bargaining unit decisions in hospital cases are in "disarray" (A25)—some holding maintenance units appropriate—and others presenting similar facts holding that maintenance units are not appropriate (A21-22). Certainly with the NLRB's own decisions at sixes and sevens, permitting the NLRB to ignore the record and adopt the stale 13 year old bargaining unit determination of a state agency under a statute quite different than the Act (A18-21) can only promote a lack of uniformity in bargaining unit determinations, which is exactly what Congress wanted to avoid when it passed the nonprofit hospital amendments to the Act (A11-12). Hence, reversing the Court of Appeals in this case would not promote uniformity in the NLRB's

administration of the Act—it would do exactly the opposite contrary to the will of Congress.

**C. This case does not present a recurring problem in the administration of the Act.** To our knowledge, the only cases since the nonprofit hospital amendments to the Act became effective on August 26, 1974—three and one half years ago—that have presented the question of whether the NLRB may grant comity to a state agency's bargaining unit determination are this case, *Memorial Hospital of Roxborough* v. *NLRB, supra,* and *Allegheny General Hospital,* 230 NLRB No. 134 (1977), *petition for review pending,* Third Circuit Docket No. 77-2090. For the issue to arise only three times in three and one-half years shows that it is unlikely to arise frequently in the future. Indeed, the issue would have to arise close to the time when the NLRB assumed jurisdiction over nonprofit hospitals (August 26, 1974) or be lost through the hospital's and the union's bargaining history under the Act after jurisdiction passed from the state agency to the NLRB. *Fraser & Johnston Co.,* 189 NLRB 142, 151 n. 50 (1971); *Great Atlantic & Pacific Tea Co., Inc.,* 153 NLRB 1549 (1965). Thus, even if the Court of Appeals were wrong on the comity issue, which it clearly was not, there would be no reason for this Court to review its decision.

**D. The Court of Appeals was right.** In holding that the NLRB had no authority under the Act to abdicate its duty in favor of the New York State Labor Relations Board to decide whether LICH's maintenance employees are a unit appropriate for collective bargaining under the Act, the Court of Appeals relied not only on the express legislative history justifying its holding, but also on this



Court's holding in *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U.S. 18, 26 (1949), and the Act's express terms.

As the legislative history the Court of Appeals cited (A11-12) shows, Congress expressly rejected deferring to prior state agency decisions on bargaining unit issues. In *La Crosse Telephone Corp., supra,* this Court held that

> "A certification by a state board under a different or conflicting theory of representation may threfore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision." 336 U.S. at 26.

This shows that this Court already has mandated that the NLRB not defer to state agency bargaining unit determinations, but should decide bargaining unit questions itself.

Finally, section 9(b) of the Act, 29 U.S.C. §159(b), expressly states that

> "*The Board shall decide* in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ." (emphasis added).

No language could more clearly show that the NLRB may not delegate its power to decide what employees constitute "the unit appropriate for the purposes of collective bargaining" to a state agency, particularly where, as the Court of Appeals noted here, the state statute and the Act "[o]n their face . . . are significantly different" (A18).

## CONCLUSION

**For all the foregoing reasons, this Court should deny Local 144's petition for a writ of certiorari.**

Respectfully submitted,

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**March 15, 1978**

# APPENDIX

**Letter Dated January 17, 1978 from Associate Executive Secretary of the NLRB**

[LETTERHEAD OF]

NATIONAL LABOR RELATIONS BOARD

[SEAL]

Washington, D.C. 20570

January 17, 1978

Re: The Long Island College Hospital
Case No. 29-CA-4562

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Gentlemen:

The Board has decided to accept the remand from the Court of Appeals in the above case and all parties are hereby notified that they may file Statements of Position with the Board with respect to the issues raised by the remand. Such Statements of Position must be received by the Board on or before February 1, 1978 and must conform with Section 102.46(j) of the Board's Rules and Regulations.

After receipt of any Statements of Position filed, the Board will proceed to review the matter and take appropriate action consistent with the Court's remand. All parties will be advised of whatever action the Board takes.

Very truly yours,

/s/ GEORGE A. LEET
George A. Leet
Associate Executive Secretary